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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/828,642	04/21/2004	I. Richard Schaffner		5330

7590
I. Richard Schaffner
17 Birch Court
Goffstown, NH 03045

03/03/2006

EXAMINER

FORD, ALLISON M

ART UNIT PAPER NUMBER

1651

DATE MAILED: 03/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/828,642

Applicant(s)

SCHAFFNER, I. RICHARD

Examiner

Allison M. Ford

Art Unit

1651

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 23 February 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).


4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: 12 and 17.
Claim(s) rejected: 1-18.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____
13. ☐ Other: _____.


FRANCISCO PRATS
PRIMARY EXAMINER

Continuation of 3. NOTE: The proposed amendments include a new claim 19, drawn to a method of enhancing reductive dehalogenation comprising adding a mixture of a biodegradable sugar and Brewer's yeast to contaminated soil; this method is considered to be a distinct invention that independent and distinct from the invention originally claimed (composition) and thus will not be entered at this time. The method of claim 19 is determined to be independent and distinct from the composition of claims 1-18 because the composition of claims 1-18 can be used for methods other than that of claim 19, for example, a mixture of Brewer's yeast and a biodegradable sugar can function as substrates, as part of a culture medium, for bacterial cultures in vitro; the mixture need not be supplied to contaminated ground soil for reductive dehalogenation.

Continuation of 11. Applicants request for reconsideration has been fully considered, but is not found persuasive.

Regarding the arguments against the rejection under 35 USC 102(b) over Rebhan, because the amendments to the claims have not been entered for the reasons discussed above the argument is considered to be directed to limitations not in the presently examined claims. However, in the interest of providing compact prosecution, it is noted that if the amendment to claims 1 and 12 were to be submitted in a separate document, that does not include new claim 19, the amendments would be entered and the new limitations would obviate the rejection of claims 1, 5-7 and 12-14 under 35 USC 102(b) over Rebhan.

Regarding the arguments against the rejections under 35 USC 103(a) over Keasling and Keasling et al in view of Hince et al, applicants argue that the use of whole Brewer's yeast is not obvious over Keasling, who teaches use of yeast extract. Specifically applicants reiterate their previous arguments that Keasling teaches away from use of Brewer's yeast because they certainly would have known of the existence of Brewer's yeast, yet chose to omit it, and because the heat and irradiation processes used in Keasling might have damaged whole yeast. Additionally, applicants submit a declaration showing what they describe as substantive experimental evidence showing that Brewer's yeast provides unexpectedly superior results for use in reductive dehalogenation versus yeast extract.

In response, the argument that Keasling teaches away from the use of Brewer's yeast remains unpersuasive for the reasons of record. Regarding the declaration, the declaration has not been entered because applicant has not provided a showing of good and sufficient reason why the evidence is necessary and was not presented earlier. The first non-final action included the same obviousness rejections over Keasling, stating it would have been obvious to substitute whole yeast for the yeast extract, evidence intended to refute such equivocation should have been provided with the response to the original rejection. However, in the interest of providing compact prosecution, the declaration has been considered, but was not found persuasive. The evidence provided in the declaration is based on comparisons of the Biochemical Oxygen Demand (BOD) and Dissolved Organic Carbon (DOC) between Brewer's Yeast and yeast extract. In both tests, the yeast extract yielded much higher results; yet applicant continually submits that the lower values produced by Brewer's yeast is evidence that Brewer's yeast "preserves the nutritional value of the yeast" and allows it to be "significantly different and better than Yeast Extract for the desired use (enhancing reductive dehalogenation)." However, there is no evidence showing the effect of Brewer's Yeast or Yeast Extract on reductive dehalogenation; therefore there is no nexus between the evidence and the claimed invention. Furthermore, if one were to consider the BOD and DOC as indicators of the potential for enhancing reductive dehalogenation, clearly the greater values produced by yeast extract would be more desirable than the low values produced by Brewer's yeast; applicants appear to equate the low values with reduced bioavailability, but fail to provide a clear explanation of how reduced bioavailability or 'preserved nutritional value' effects, in any way, reductive dehalogenation. The burden is on applicant to explain how the data supports their conclusions, it cannot merely be stated that the evidence supports their arguments, particularly in situations such as that of the current declaration, where the data appears to be contradictory to the assertions of applicant. See *Ex parte Ishizaka*, 24 USPQ2d 1621, 1624 (Bd. Pat. App. & Inter. 1992). Therefore, without substantial explanation of how applicants arrive at their conclusion that the evidence provided in the declaration directly shows the superior qualities of Brewer's Yeast over yeast extract on reductive dehalogenation, the evidence is not found persuasive.